IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:	)	Chapter 7 Case
	)	Number 188-00215
OTIS LEE GOLDSBY	)	
MARY TUTT GOLDSBY	)	
	)	FILED
Debtors	)	at 1 O'clock & 15 min. P.M.
	)	Date: 3-2-89
OTIS LEE GOLDSBY	)	
MARY TUTT GOLDSBY	)	
	)	
Plaintiffs	)	
	)	
vs.	)	Adversary Proceeding
	)	Number 188-0041
FIRST UNION NATIONAL BANK	)	
	)	
Defendant	)	
	)	
IN RE:	)	Chapter 7 Case
	)	Number 188-00351
KENNETH STANLEY CANINGTON	)	
WANDA MARIE HILL CANINGTON	)	
	)	
Debtors	)	
	)	
KENNETH STANLEY CANINGTON	)	
WANDA MARIE HILL CANINGTON	)	
	)	
Plaintiffs	)	
	)	
vs.	)	Adversary Proceeding
	)	Number 188-0044
THE CITIZENS AND SOUTHERN	)	
NATIONAL BANK	)	
	)	
Defendant	)	

ORDER

The primary issue presented for resolution in these adversary proceedings being identical, the cases are consolidated

for the purposes of findings of fact and conclusions of law.

In each case before the court the plaintiffs' complaint seeks a permanent injunction against defendants to prevent defendants from repossessing plaintiffs' motor vehicle following discharge so long as there is no default under the purchase money loan agreement secured by the motor vehicle other than the fact of the plaintiff having sought relief under Title 11, the Bankruptcy Code.

In Goldsby, the facts are not in dispute. The plaintiff debtors (debtors) and the defendant bank (First Union) entered into a security agreement whereby First Union extended sufficient funds to the debtors for the purchase of a 1981 Buick Regal automobile and the debtors granted First Union a security interest in the vehicle.

The security agreement contained a provision providing for default by the debtors upon the filing for relief under Title 11, the Bankruptcy Code. On February 22, 1988 the debtors filed for relief under Chapter 7 of Title 11. At the time of filing for relief, the debtors were not in default on their loan. First Union has sought a reaffirmation agreement, but on advice of counsel, the debtors have refused. Now the debtors seek a permanent injunction to prevent First Union from relying upon the default upon filing

provision of the security agreement to declare the loan agreement in default and repossess their security post discharge.

In Canington, the factual background is almost identical. The plaintiff debtors (debtors) and defendant bank (C & S) entered into a security agreement whereby C & S extended sufficient funds for debtors to purchase a 1986 Mazda B-2000 pickup truck and the debtors granted C & S a security interest in the motor vehicle. By the terms of the security agreement "default" was defined to include the filing for relief under any Chapter of Title 11, the Bankruptcy Code. Unlike in Goldsby, the security agreement between the Caningtons and C & S additionally provided that

the grant of the security interest in the vehicle, covered any and all indebtedness owed by debtors to C & S at the time of the execution of the security interest as well as any future advances (dragnet clause). At the time the security agreement was executed and the purchase money extended, the debtors had a credit card account with C & S with an outstanding balance of Six Hundred Thirty Six and 11/100 ($636.11) Dollars. The certificate of title issued by the State of Georgia on January 1, 1986 makes no mention of the credit card indebtedness or the dragnet clause of the security agreement. The title certificate references only the conditional sales contract for the purchase of the pickup truck dated January 9, 1986.

On March 22, 1988 the debtors filed for relief under Chapter 7 of Title 11. At the time of filing, the debtors were

current in their payments to C & S on the vehicle. The debtors owed C & S at the time of the petition and outstanding balance of Four Thousand Seven Hundred Eighty Five and No/100 ($4,785.90) Dollars on the purchase money motor vehicle loan as well as an additional credit card balance of Nine Hundred Ninety Seven and 69/100 ($997.69) Dollars.

Following the filing of the petition, C & S requested that the debtors reaffirm in writing pursuant to 11 U.S.C. §524(c)(2) their debt to the bank in the amount of Four Thousand Seven Hundred Eighty Five and 90/100 ($4,785.90) Dollars together with future interest secured by the truck. The amount requested for reaffirmation did not include the credit card balance. On advice of counsel, the debtors have refused to execute such agreement. Now, to prevent C & S from relying upon the bankruptcy default provisions in the security agreement as grounds for repossession following discharge, the debtors seek to permanently enjoin such action so long as the debtors do not default under any other provision of the security agreement.

In both cases, the debtors take the position that the banks may not act to

repossess so long as the only default under the security agreement is the debtors filing for relief under Chapter 7 of Title 11. According to the debtors, the respective banks may not compel a debtor to give up the loan collateral under the terms of the security agreement, reaffirm the debt under 11

U.S.C. §524(c)(2) or redeem the collateral under 11 U.S.C. §722. ln short the debtors are entitled to keep the vehicle after discharge without further action on their part other than remaining current in their respective payments under the original note.

Defendant banks counter that absent reaffirmation or redemption the default upon bankruptcy clause is enforceable under state law immediately upon the lifting of the stay by the granting of the discharge. 11 U.S.C. §362(c)(1). Section 362(c)(1) provides that the stay of an act against property of the estate under subsection (a) of §362 continues until such property is no longer property of the estate; and the stay of any other act under subsection (a) of §362 continues until in a case under Chapter 7 of Title 11 concerning an individual, the time a discharge is granted. The defendant banks are emphatic in their position that among the things that was contracted for prior to the extension of credit was the personal liability of the debtors. A discharge extinguishes that liability. See, 11 U.S.C. §727(b). Thus, if the debtor may retain possession of the collateral without any personal liability, the defendant banks' only recourse is against the loan collateral which the banks do not possess and do not have control over. The banks contend they are in constant risk of loss or destruction of their collateral without any means to compel the debtors to insure or maintain the collateral. Additionally, without being subject to personal liability, the debtors could retain the collateral and

remain current in their payment obligations only so long as the value of the collateral, equals or exceeds the outstanding balance due under the original loan

agreement. In the event that the outstanding loan balance exceeds the value of the collateral the bank would bear the entire risk of the depreciation as a result of the debtors' post discharge use.

There is apparently no binding authority on this issue in this jurisdiction, although both parties have cited persuasive authority to support their position. After considering briefs of counsel, this court concludes that the Bankruptcy Code provides two exclusive remedies after a Chapter 7 filing for a debtor seeking to retain property securing a purchase money secured debt -- - reaffirmation under §524 or redemption under §722. Absent reaffirmation or redemption, the original contract between the creditor and the debtor, including any default upon filing bankruptcy clause, determines the respective rights of the parties to the collateral under applicable state law.

It is axiomatic that the bankruptcy laws disfavor ipso facto clauses which purport to entitle a creditor to call due an indebtedness solely on account of a filing of bankruptcy. However, there is no general provision in Title 11 that invalidates an ipso facto clause for all purposes under Title 11. Under Title 11, the scope of the invalidation of ipso facto clauses are limited in duration to the pendency of the bankruptcy case and limited in

application to specific circumstances. Under 11 U.S.C. §363(1) trustee may use, sell or lease property of the estate notwithstanding an ipso facto default clause which attempts to prevent the debtor's property from becoming property of the estate solely on account of the filing for relief. In addition, §541(c) includes as property of the estate that property in which the debtor has an interest as of the filing date notwithstanding an ipso facto clause which attempts to destroy the debtor's interest upon filing. Also, §365(e) refuses to give affect to an ipso facto cause in executory contracts or leases.

The rationale for suspending such clauses during the pendency of a case is self-evident: the debtor or the trustee as the case may be needs sufficient time to consider their respective options as to liquidation or reorganization without

risking the loss of property through the mechanistic operation of an ipso facto default upon bankruptcy clause in a contract, lease or security agreement. The benefits of the bankruptcy law protections would be largely illusory if the debtor's estate could be stripped a valuable property interest at the instant filing. Thus the court in Riggs National Bank of Washington v. Perry, 729 F.2d 982 (4th Cir. 1984), cited and relied upon by the debtors in both cases, refused to grant a lift of stay where the creditor depended upon the default on bankruptcy clause to prove its entitlement for relief.

The salutary effect of invalidating or suspending ipso facto clauses during the pendency of a case loses its force when the debtor receives a discharge or the case is closed. At such time, property of the estate is either distributed, abandoned or revested in the debtor. Executory contracts or leases have been either effectively rejected or assumed. The trustee has either sold, leased or abandoned the property of the estate. The question remaining is, why should the terms of the agreement enforceable under state law not be given affect.

The debtors in each case suggest that one compelling reason is the impediment to a fresh start which would result if a creditor could rely upon an ipso facto clause after discharge. The debtors cite cases which hold that it would be repellant to give a creditor the ability to use its ipso facto clause when there is no default in any other respect. See, In re: Peacock, 87 B.R. 657 (Bankr. D. Colo. 1988). The logic expressed in cases such as Peacock is the undue bargaining power a creditor could have in the reaffirmation of debts would seriously disadvantage the debtors seeking to start a new financial life. The court in In re: Horton, 15 B.R. 403 (Bankr. E.D. Va. 1981) stated:

> "What justice is there in condoning snatching the vehicle - or any property - when the creditor is chagrinned because the borrower filed bankruptcy? To provide otherwise will give rise to the birth of the bankruptcy clause as a tool or weapon against those who file bankruptcy. Id. at 405.

See also, In re: Schweitzer, 19 B.R. 860 (Bankr. E.D NY. 1982).

While the positions taken by the courts in Horton and Peacock enumerate legitimate concerns for the attainability of a meaningful fresh start, this court finds no basis for the issuance of the permanent injunction sought by the debtors. The stay which prevents a creditor from pursuing a valid state law cause of action against a debtor upon the filing for relief under Title 11 is the stay imposed pursuant to 11 U.S.C. §362(a). Under §362(c) this stay expires when the property is no longer property of the estate and as to any action other than an action against property, upon the earliest of the closing or dismissal of the case, or if the case is a case under Chapter 7 concerning an individual the time a discharge is granted or denied. There is no provision in Title 11 for the extension of the stay beyond this point. In the present cases, the property, motor vehicles, are no longer property of the estate and the debtors have sought and r without regard to the outcome of these adversary proceedings, will receive a discharge.

Prior to the termination of the automatic stay under §362(c), a debtor seeking to retain property securing an obligation has two exclusive remedies under Title 11. See, In re: Bell, 700 F.2d 1053 (5th Cir., 1983). First, the debtor may redeem under §722.

> Individual may . . . redeem tangible personal property intended primarily for personal, family, or household use, from a lien securing dischargeable consumer debt such property is exempted under Section 522 . . . or has been
>
> abandoned under Section 554 . . ., by paying the holder of such lien the amount of the allowed secured claim of such holder that it secured by such lien. 11 U.S.C. §722.

This provision amounts to a right of first refusal for the debtor in consumer goods that might otherwise be repossessed. HR Rep. No. 95-595, 95th Cong., 1st Sess. 380-81 (1977). This option entails paying the secured creditors secured claim in cash. In re: Caroll, 11 B.R. 727 (BAP 9th Cir. 1981). The debtors assert that §722 redemption is a "dead letter" as the typical Chapter 7 individual debtor is without sufficient cash to pay off a security interest in order to retain possession of the collateral. Debtors are correct that from a practical standpoint, the

typical Chapter 7 individual debtor usually enters Chapter 7 strapped for cash; however, Congress established this procedure as a debt relief device available to debtors who wish to retain property pledged as collateral for an obligation. This procedure establishes that the extinguishment of a secured creditor's rights under a contract must be accompanied with the turnover of the creditor's property interest in any collateral in the form of cash. This right of first refusal is the mechanism established by congress for a Chapter 7 individual debtor to deal with a creditor for whatever reason refusing to enter in a reaffirmation agreement.

The second general means for collateral retention by a Chapter 7 debtor is to reaffirm the debt which is secured by the

collateral pursuant to §524(c)(1).

> "(c) An agreement between a holder of a claimand a debtor, the consideration for which, in whole or in part, is based on a debt that is chargeable in a case under this title is enforceable only to the extent enforceable under applicable non-bankruptcy law, whether or not discharge of such debt is waived, only if --
>
> 1. such agreement was made before the granting of the discharge under Section 727 . . ."

Reaffirmation renews the obligation secured by the collateral, notwithstanding the discharge, leaving the debtor personally liable for any post-discharge default. In this manner the debtor can retain the property without the necessity of an immediate cash payment in full as required under §722 with the quid pro quo of personal liability for the reaffirmed debt. Reaffirmation, like the initial contract between lender and debtor, is a consensual transaction. See, In re: Whaley, 16 B.R. 394 (Bankr. N.D. Ohio, 1982. The creditor may never compel the debtor to reaffirm nor may the creditor be compelled to allow reaffirmation. The debtor who does not reaffirm must consider the consequences of losing the

property securing the obligation. The debtors assertion that by virtue of the inequitable bargaining power available to creditors holding a non-avoidable security interest in debtors' property the creditor could extract unconscionable terms of reaffirmation. this position ignores the procedural safeguards inherent in a valid reaffirmation agreement at prevents creditor overreaching. These

safeguards include the right to rescind, the need for the debtors' counsel to declare the reaffirmation to be in the debtors' best interest or, where such declaration is not given and the debtors still wish to enter the reaffirmation, the court must inquire into whether the reaffirmation is in the debtors best interest. See 11 U.S.C. §524(c)(2)(3)(4)(6) & (d).

Redemption or reaffirmation are the exclusive remedies available to a Chapter 7 debtor seeking to retain a motor vehicle which stands as collateral for a debt. Chapter 7 of Title 11 was never intended as a part of a reorganization process whereby contractual modification is one of the available debtor tools. Chapter 11, 12 and 13 quite clearly are different. See, §1123(a)(5), §1222(b)(3) and §1322(b)(3); In re: Miller 4 B.R. 503 (Bankr. E.D. MI, 1980). Had the debtors chosen to reorganize rather than liquidate under Chapter 7, they could quite obviously have cured any default and perhaps even modified their personal liability. See, §1322(b)(2); In re: Whatley supra at 397. Debtors sought relief under Chapter 7 and are bound within limitations of relief available under Chapter 7.

As the debtors are not entitled to the relief sought as a matter of law under the Bankruptcy Code, they must rely upon the equitable powers of this court seeking injunctive relief. 11 U.S.C. §105. The debtors insist that it is equitable and necessary for their fresh start to allow them to retain possession o£ their motor

vehicles so long as they remain current with their payments as contracted for to the

banks without the requirement of reaffirmation under §524 or redemption under §722. Reaffirmation of the entire debt with an obligation to make monthly payments somehow adversely impacts upon their fresh start but voluntarily making the same monthly payment in order to retain possession of the vehicle does not. This proposition is not logical unless one accepts the premise of the banks that the debtors will simply make the payments until the combination of age and use devalues the collateral to a value substantially less than the amount due at which point the debtors simply walk away leaving the banks to absorb the loss occasioned by the debtors' post-discharge retention and use of the collateral. This is far from equitable. The debtors contend that this is precisely the risk taken by the banks when the loans were made. This court disagrees. The transaction between the debtors and the bank was a promissory note personally obligating the debtors which personal obligation was secured by the collateral. The intervention of the bankruptcy discharge ends the personal obligation and all that remains is the collateral. This court sees no basis in law or in equity for the issuance of an injunction to prevent this secured creditor following discharge from exercising its contractual rights under state law against the collateral securing the obligation discharged.

There remains the issue in the Canington matter wherein

the debtors seek a permanent injunction to prevent the enforceability of the security agreement's dragnet clause. At the conclusion of the trial this court noted that there was no evidence of overreaching in obtaining or evidence of unconscionability in the use of the dragnet clause in this case. This decision is limited to the question of whether creditor's failure to comply with the Georgia perfection of title requirements rendered the lien unenforceable as to the credit card debt. Under Official Code of Georgia Annotated (O.C.G.A.) §40-3-53, no lien is effective against a vehicle unless the lien is perfected according to law. The debtors argue that because the title issued to C & S does not mention the credit card debt to be secured by the lien, that the indebtedness is not perfected. O.C.G.A. §40-3-50(b) provides

> "A security interest is perfected by delivery to the commissioner of the existing certificate of title, if any, and an application for a certificate of title containing the name and address of the holder of a security interest, the date of the security interest, and the required fee."

In the present case, these requirements were met and the lien was perfected. The fact that the certificate of title contained the additional language that characterized the lien as "conditional sales contract" is irrelevant to the perfection statute. The lien of C & S was perfected and extended to the credit card obligation by virtue of the dragnet clause language contained in the security agreement.

IT IS THEREFORE ORDERED that the debtors' complaint seeking injunctive relief is denied. Judgment shall issue in each case for defendants. No monetary damages are awarded.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 2nd day of March, 1989.